FOO KHAI YUEN

v.

REGIONAL REGISTRAR/SENIOR REGISTRAR, JABATAN PENDAFTARAN NEGARA

HIGH COURT SABAH & SARAWAK, MIRI
TUAN TEE AH SING JC
[ORIGINATING MOTION NO. MR.1 OF 1993]
30 DECEMBER 1994

***ADMINISTRATIVE LAW**: Application for leave to apply for an order of certiorari to quash decision of respondent refusing application of applicant for correction of his birth date - Matter going up to Supreme Court - Supreme Court ordering that applicant be given liberty to reapply to proper authority - Whether proper authority refers to High Court or respondent - Whether certiorari application premature - Whether respondent should have reapplied to respondent before filing current application.*

The applicant made an application under s. 25(3) of the Birth and Death Registration Ordinance (Cap. 10) Sarawak, for correction of his birth date. The respondent refused the application. The applicant applied for an order of mandamus which application was refused by the High Court. On appeal, the Supreme Court dismissed the appeal on the grounds that the procedure adopted by the applicant was wrong but ordered that the applicant be given liberty to reapply to the proper authority for the correction of his birth date.

The applicant then filed the current application for leave to issue an order of certiorari to quash the decision of the respondent, contending that the Supreme Court order had given leave to do so. Subsequent to the filing of the current application, the applicant reapplied to the respondent who again rejected the application and affirmed their earlier decision.

Held:

[1] A proper reading of the relevant part of the Supreme Court order shows that the applicant was given liberty to reapply to the appropriate authority to amend his date of birth. Nothing is mentioned in this order about the applicant being given leave to apply for certiorari.

[2] The applicant should have made another application to the respondents to amend his date of birth in compliance with the Supreme Court order. If the reply from the respondents was in the negative, then the applicant could file the motion for certiorari within 6 weeks of the date of decision of the respondents.

[3] From the evidence adduced it is clear that when the present application was filed on 30 January 1993 the applicant had not reapplied to the respondents for correction of his date of birth. The application to amend the date of birth was made on 23 October 1993, that is, after the filing of this originating motion. In the circumstances the current application is premature as the applicant can only file this originating motion within 6 weeks of the decision of the respondents dated 2 November 1993 and not otherwise.

[Application for leave to apply for an order of certiorari refused. Originating motion dismissed with costs]

Legislation referred to:
Specific Relief Act 1950, ss. 44, 45
Births and Deaths Registration Ordinance (Cap.10), s. 25(3)

For the applicant - Tai Choi Yu; M/s. Tai Choi Yu & Co.
For the respondents - Ahmad Razif bin Mohd. Sidek, FC

JUDGMENT

Tee Ah Sing JC:
This is an application by way of *ex parte* notice of motion by the applicant, Foo Khai Yuen for leave to apply for an order of certiorari to remove to this Court for the purpose of it being quashed the decision of the Regional Registrar and/or Senior Registrar of the Department of National Registration dated the 19 December 1990 refusing and/or rejecting the application of the said applicant for correction of his birth date made under and by virtue of s. 25(3) of the Birth and Death Registration Ordinance (Cap. 10) (Sarawak) and/or alternatively for a declaration that the said decision of the Regional Registrar and/or Senior Registrar in rejecting and/or refusing the said application for correction was *ultra vires* and null and void on the ground that the said Regional and/or Senior Registrar had not used and/or misused and/or abused his discretion and/or acted in excess of his powers and/or jurisdiction and/or that he took irrelevant matters into consideration and/or that the decision was irrational and unreasonable and/or contrary to the elementary rules of natural justice and fairness.

The grounds upon which the reliefs are sought are as follows:

1) that the said decision was wrong in law;
2) that the said decision took irrelevant matters into consideration and/or that the said decision failed and/or refused to take relevant matters into consideration;
3) that the said decision was unreasonable and the exercise of the discretion, if any, was fettered;
4) that the said decision was in excess of jurisdiction;
5) that the said decision was an unlawful delegation of powers;
6) that the said decision was a breach of the statutory duties of the Regional/Senior Registrar; and
7) that the said decision was contrary to the elementary rules of the natural justice and fairness.

In his affidavit, the applicant deposed that on or about the 24 October 1990, he applied under s. 25(3) of Cap. 10 as in exhibit "FKY-1" to the Regional Registrar National Registration Department Miri for the correction of his birth date and enclosed therewith his birth certificate exhibit "FKY-2" and two statutory declarations one of his mother Ng Sam Lan (exhibit "FKY-3") and another of the mid-wife Lee Fay Neng (exhibit "FKY-4").

He further deposed that by letter dated 19 December 1990 (exhibit "FKY-5") the Regional Registrar rejected his application on the ground that changing of his identity card must follow the details of his birth certificate.

He also deposed that no notice of the said rejection and/or refusal was given to him and no reasonable opportunity was given to him to rebut any charges and/or evidence detrimental

to his said application which the respondents considered and/or levelled against him. No hearing was convened by the respondents on his said application and no reasonable opportunity was accorded to him to make representations on his behalf.

Lastly, he deposed that the true date of his birth clearly affected his property, franchise and personal right and so long as it stands uncorrected he was injured and prejudiced thereby that it was within his right to have the correction; that he demanded justice to right the injuries which justice had been denied him by the refusal of the Regional Registrar/Senior Registrar.

This application is also supported by the affidavit of Tai Choi Yu, who is the advocate for the applicant affirmed on 29 January 93. In paragraph 5 Mr. Tai Choi Yu deposed that by an originating motion no. 1 of 1991 he as Counsel on record for the applicant being dissatisfied with the said decision, took out a motion in the High Court in Borneo at Miri for an order in the nature of a mandamus under ss. 44 and 45 of the Specific Relief Act 1950 ordering the said Regional and/or Senior Registrar to enter the said correction in the Register in the performance of his statutory duty. He also deposed that the aforesaid originating motion was heard at Miri before the Honourable Mr. Justice Denis Ong Jiew Fook and he gave judgment against the applicant.

In paragraph 7 he deposed that the applicant being dissatisfied with the aforesaid judgment of the High Court appealed to the Supreme Court. At the hearing on the appeal at the Supreme Court in Kuala Lumpur on 18 January 1993 the Full Court of the Supreme Court were of the opinion that the procedure used by the applicant under ss. 44 and 45 of the Specific Relief Act 1950 seeking for an order in the nature of a mandamus was procedurally incorrect. In their Lordship's opinion the procedure was to apply for the prerogative order of certiorari to remove the said decision to this Court and quashed.

In view of their Lordship's opinion the Supreme Court dismissed the appeal but expressly ordered the applicant be given liberty to apply (for the prerogative order of certiorari to remove the said decision to this Honourable Court and quash). A copy of the draft order signed by him as Counsel for the applicant and the Federal Counsel as Counsel for the respondents is exhibited as "TCY-2".

A first supplementary affidavit was affirmed by Tai Choi Yu affirmed on 24 September 1994. In paragraph 3 he deposed that as Counsel for the applicant he did make an application to the Supreme Court for the amendment of the Supreme Court order delivered on 18 January 1993 and dated 13 October 1993. The said application was heard by the Supreme Court on 30 May 1994 and the said amendments were allowed then and there by the said Supreme Court. And in paragraph 5 it is averred that on or about 29 August 1994 he received the vetted and approved copy of the said amended order from the Registrar of the Supreme Court. A copy of the said Registrar's letter dated 18 August 1994 (exhibit "TCY-3") and the said amended order ("exhibit "TCY-4") were exhibited.

It is also averred that todate he has not received the sealed order.

In paragraph 8 it is deposed that further he had on behalf of the applicant applied to the respondents afresh for correction of the applicant's birth certificate under s. 25(3) of the Registration of Births and Deaths Ordinance (Cap.10) *vide* letter dated 23 October 1993 (exhibit "TCY-6). And in paragraph 9 it is deposed that on or about the 20 November 1993 he received a reply from the respondents to the aforesaid fresh application by the applicant. The said

reply (exhibit "TCY-7") rejected the said fresh application by affirming the respondents' decision made on 27 November 1990 which is actually the impugned decision dated the 19 December 1990.

Although this is an *ex parte* application, I had in the exercise of my discretion heard not only the applicant but also the respondents.

Encik Ahmad Razif bin Mohd. Sidek, Federal Counsel for the respondents submitted that the present application is premature in the light of the Supreme Court order. The applicant should have complied with the Supreme Court order dated 18 January 1993 which was duly amended on 30 May 1994 to reapply to the proper authority for correction on the date of birth. Learned Federal Counsel referred to paragraph 7 of Tai Choi Yu's affidavit wherein the applicant's advocate in contending that the words "with liberty to file fresh to the proper authority" liberty is given to apply for the prerogative order of certiorari. The respondents' objection on this point is that the order of the Supreme Court only gave leave for the applicant to re-apply for the corrections to the proper authority.

Learned Counsel for the applicant submitted that the Supreme Court had made an oral ruling for the applicant to file afresh to the appropriate authority. Learned Counsel for the applicant contended that there are actually two authorities in this case. Firstly the High Court and secondly the respondents. In the case of the High Court there is a time restriction of 6 weeks whereas in the case of the respondents there is no time limit at all. Learned Counsel for the applicant therefore submitted that the date of the proceedings in this case is the date of the order of the Supreme Court, that is 18 January 1993. Within 6 weeks they have only until the 3rd week of February 1993 to file this application for certiorari which was filed on 30 January 1993, that is within the 6 weeks.

Exhibit "TCY-4" is a fair copy of the Supreme Court order and the relevant part reads as follows: "Dan seterusnya diperintahkan bahawa perayu diberi kebebasan memohon semula kepada pihak berkuasa yang sesuai mengenai pengubahan tarikh kelahirannya."

My reading of this part of the order is that the applicant is given liberty to reapply to the appropriate authority to amend his date of birth. Nothing is mentioned in this order about the applicant being given leave to apply for certiorari.

I agree with the contention of learned Federal Counsel for the respondents that the applicant should have made another application to the respondents to amend his date of birth in compliance with the Supreme Court order. And if the reply from the respondents is in the negative, then the applicant to file, the motion for certiorari within 6 weeks of the date of decision of the respondents. In the instant case according to paragraphs 8 and 9 of Tai Choi Yu's affidavit the advocate applied afresh on behalf of the applicant for correction of the applicant's birth certificate vide letter dated 23 October 1993. And on or about 20 November 1993 he received a reply (exhibit "TCY-7") from the respondents rejecting the said fresh application by affirming the respondents' decision made on 19 November 1990. The 6 week period should start from 2 November 1993 that is the date the decision was conveyed to the applicant's solicitor.

It is clear that when this originating motion was filed on 30 January 1993 the applicant had not reapplied to the respondents for correction of his date of birth. The application to amend the date of birth was made on 23 October 1993, that is, after the filing of this originating motion. I therefore agree with learned Federal Counsel for the respondents that this originating motion is premature.

The applicant can only file this originating motion within 6 weeks of the decision of the respondents dated 2 November 1993 and not otherwise.

I disagree with learned Counsel for the applicant's contention that the said Supreme Court order gave leave to the applicant to file the originating motion within 6 weeks of the date of decision of the Supreme Court because the fair copy of the order (exhibit "TCY-4) does not support his contention.

The application for leave to apply for an order of certiorari is refused.

I therefore dismiss this originating motion with costs.